Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-11

NORTHERN CALIFORNIA POWER AGENCY, *Petitioner*

vs.

FEDERAL POWER COMMISSION and
PACIFIC GAS AND ELECTRIC COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for
the District of Columbia Circuit

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No.

NORTHERN CALIFORNIA POWER AGENCY, *Petitioner*

vs.

FEDERAL POWER COMMISSION and
PACIFIC GAS AND ELECTRIC COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for
the District of Columbia Circuit

The Northern California Power Agency, a joint powers agency of the State of California, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. F, infra, pp. 25-35) is not yet reported. The opinions

and orders of the Federal Power Commission (Apps. B, pp. 5-13; and D, pp. 16-22, infra) which the Court reviewed are reported at 45 FPC 1153 (1971) and 49 FPC 1103-04 (1973).

JURISDICTION

The judgment of the Court of Appeals (App. E, infra, pp. 23-24) was entered on March 6, 1975, and no rehearing by that court was sought or granted. By order dated May 22, 1975, petitioner was granted an extension of time within which to file a petition for a writ of certiorari in this matter to and including July 7, 1975. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and section 313(b) of the Federal Power Act (16 U.S.C. 825 l(b)).

QUESTIONS PRESENTED

1. Do the federal antitrust laws permit the Federal Power Commission to infer no reasonable nexus between a rate filed with the Federal Power Commission and the other, anticompetitive, provisions of the contract which establishes it?

2. Does the Federal Power Commission have authority to grant relief from a contract which is a part of a plan to obtain a high degree of monopoly power over electric generation resources in northern and central California?

STATUTE INVOLVED

The statutory provisions involved are Section 205 (49 Stat. 851; 16 U.S.C. 824d) and 206 (49 Stat. 852, 16 U.S.C. 824e) of the Federal Power Act. They are printed in Appendix A, infra, pp. 1-4.

STATEMENT OF THE CASE

The Federal Power Commission denied a hearing to petitioner Northern California Power Agency ("NCPA") on its complaint under section 206 of the Federal Power Act (App. A, p. 4) that certain contracts filed as a rate under section 205 of the Federal Power Act (App. A, pp. 1-3) were unjust, unreasonable, against the public interest and in violation of the antitrust laws.

The contracts in controversy are dated February 4, 1970, and are between Pacific Gas and Electric Company ("PG&E") and Sacramento Municipal Utility District ("SMUD"). PG&E is subject to Federal Power Commission jurisdiction; SMUD, as a public agency of the State of California, is not.

The contracts provide for the performance of certain services by PG&E for SMUD, in connection with the then proposed construction of a nuclear electric generating plant by SMUD, including the sale of supplemental power to SMUD. They also provide that SMUD shall sell all its surplus power exclusively to PG&E including that to be generated by a second generating plant to be constructed by SMUD in the

future. NCPA attacked this latter provision by its complaint. It said that it would not object to the contracts if the plant SMUD contemplated were enlarged, and some of its power made available to NCPA.

The Federal Power Commission justified its refusal to grant a hearing on NCPA's complaint on the ground that the complaint "does not allege rate discrimination, nor does it allege that the proposed rates are unjust and unreasonable." (App. B, p. 11; 45 FPC at 1155). It also said that NCPA had requested it to exercise jurisdiction over a nuclear unit being built by SMUD, a State agency, over which it had no jurisdiction[1] (ibid.).

After the Commission's dismissal of NCPA's complaint, and while NCPA's petition for rehearing was pending, the Attorney General of the United States rendered his opinion to the U.S. Atomic Energy Commission in connection with an application by PG&E to that Commission to construct its Mendocino nuclear power plant, which was published in the Federal Register (37 F.R. 16423-6, August 12, 1972) as required by law (Atomic Energy Act of 1954, as amended, section 105 c(5), 84 Stat. 1472, 42 U.S.C.

[1]Federal Power Commission suggested that the United States Atomic Energy Commission might have jurisdiction of NCPA's complaint (App. B, p. 9, 45 FPC at 1155). However, AEC subsequently dismissed an NCPA petition to intervene in SMUD's pending licensing application, by an order docketed April 19, 1975 in Docket No. 50-312, holding that it had no antitrust jurisdiction over section 104 b of the Atomic Energy Act (84 Stat. 1472, 42 U. S. C. 2134). The Federal Power Commission did not again make this point in its subsequent order denying rehearing.

2135 c(5)). In that opinion, responding to a complaint by NCPA, the Attorney General said that ". . . there seems to be substantial evidence that PG&E has engaged in a course of conduct which has blocked the development of bulk power alternatives by NCPA, its member systems and other distribution utilities in northern and central California for a period of at least 20 years." (37 F.R. at 16426). The Attorney General recommended that the Commission should hold an antitrust hearing, and if the hearing record supported the Attorney General's view of PG&E's activities, AEC should "Require PG&E to eliminate provisions in its contract with SMUD which preclude NCPA from participating in any generating unit that SMUD may plan and construct." (37 F.R. 16425)[2]

A copy of this Opinion was attached as Exhibit G to NCPA's petition for writ of mandate filed in the Court of Appeals (No. 73-1296) to compel the Federal Power Commission to act upon the petition for rehearing. Before the return date for its response in the Court of Appeals the Federal Power Commission issued its Order denying rehearing (App. D, p. 16) without reference to the Attorney General's opinion.[3]

The Court of Appeals affirmed the Commission's decision. It said that the Commission need not hold a hearing because NCPA had not "met its burden of

[2]PG&E dismissed its application for the Mendocino plant prior to hearing, 38 F.R. 3539-40, February 7, 1973.

[3]The Court of Appeals then dismissed the petition as moot after FPC issued its decision.

showing reasonable nexus" between the matters under Commission jurisdiction and the provisions under attack in NCPA's complaint (App. F, p. 35). It also held that the Commission had "no authority to remedy" the situation of which NCPA complained (App. F, p. 35). By footnote it suggested " . . . that existing autitrust laws may well be the most beneficial means of airing NCPA's grievances." (fn. 3, App. F, p. 35).

REASONS FOR ALLOWING WRIT

(A) The principle presented in this case is important in carrying out the nation's antitrust laws; the decision of the Commission and Court below is inconsistent with the principles of the decision by this Court in *Gulf States Utilities Co. v. Federal Power Commission,* 411 U.S. 747 (1973).

The *Gulf States* case involved a protest against and petition to intervene in proceedings on an application by Gulf States Utilities Company to issue securities, under section 204 of the Federal Power Act (49 Stat. 851, 16 U.S.C. 824c). The cities alleged that Gulf had engaged in activities apparently violative of the antitrust laws in attempting to prevent a rural electric cooperative[4] from constructing generation and transmission facilities which it intended to pool with the three cities. The Commission held that the matters asserted by the cities was "irrelevant to the purpose

[4]FPC has no jurisdiction over rural electric cooperatives, *Dairyland Power Cooperative,* 37 FPC 12 (1967); *Salt River Project v. FPC,* 391 F.2d 470 (C.A. D.C., 1968).

of" issuing securities (411 U.S. at 753-4), and that "there is no relief that the Commission can order in authorizing the issuance of the Bonds . . . that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them." (411 U. S. at 753).

The Commission's decision was reversed by a different panel of the Court of Appeals from that which decided the instant case, and the Court of Appeals decision was affirmed by this Court on certiorari.

The Court in *Gulf States* outlines the "broad and impressive" (411 U.S. at 756) powers of the Commission under section 204. It is submitted that the provisions of section 205 of the Federal Power Act are equally broad, and indeed this Court refers to "like directives contained in sections 205, 206, and 207" (p. 759). Section 206 declares that

> *"Whenever the Commission, after a hearing* had upon its own motion or upon complaint, *shall find that any rate,* charges, or classification . . . for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, *or contract affecting such rate,* charge, or classification is *unjust, unreasonable, unduly discriminatory or preferential,* the Commission shall determine the just and reasonable rate . . . or contract to be thereafter observed and in force, and shall fix the same by order." (emphasis added; the entire section is set out in Appendix A, p. 4).

In *Gulf States,* this Court points out the concern over concentration of economic interests which was re-

flected in the passage of the Federal Power Act (p. 758). It says that "Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the most important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." (p. 760).

The Commission and the Court below read section 206 as though it related only to rates, and not to any "contract affecting such rate." By doing so they avoid any obligation of the Commission to establish a front line of defense against antitrust law violations.

The background of this case is well summarized in the Opinion of the Attorney General of the United States referred to earlier:

> "During the course of its inquiry, the Department has discovered a substantial amount of evidence which indicates that, since at least 1950, PG&E has acted in such a way as to establish and preserve the highest possible degree of monopoly power in, and control over, electric generation and transmission resources located in northern and central California. The evidence indicates that the Applicant has pursued a continuous course of conduct during this period which has had the effect of: (1) foreclosing the ability of municipal and cooperative distribution utilities within its service area to obtain access to numerous sources of bulk power supply and (2) precluding the independent development of generating capacity by these municipal and cooperative utilities.
>
> Most of these municipal and cooperative utilities are represented by the Northern California

> Power Agency (NCPA). . . ." (37 F.R. 16423, Aug. 12, 1972).

There is little wonder that

> ". . . the Department of Justice can only conclude that PG&E by the conduct described above has created a situation inconsistent with the antitrust laws." (ibid.)

The Court below acknowledges that this Court has "held, time and again, that the Federal Power Commission, as other regulatory agencies, must consider the anticompetitive consequence of matters properly before it." (App. F, p. 31). But the Court below essentially held that since the rates which PG&E charged SMUD under the contract were not claimed to be unjust, or unreasonable, the Commission had no business to look at the contracts which incorporated and fixed those rates, to see if the total result was to create or maintain a situation inconsistent with the antitrust laws.

Whether PG&E would have sold power to SMUD under the rates fixed in the contracts if it had not received the exclusive right to SMUD's surplus power will never be known to the Commission if the Commission refuses to consider it and receive evidence on it. NCPA alleged in its complaint that

> "The provision in the June 4, 1970, contracts preventing SMUD from disposing of any of its electric generation to NCPA, and limiting the size of Thermal Unit No. 2, is part of a scheme or plan by PG&E to monopolize the generation of electric energy in Northern and Central California so that PG&E can be the sole supplier thereof

> to the cities which comprise NCPA." (Record below, p. 138)

It cannot be in the public interest, or reasonable, or just, to allow PG&E to grant rate concessions to SMUD in exchange for obtaining all of SMUD's excess power, and thus preserving PG&E's monopoly.

In *Gulf States,* the cities were not complaining about the text of the bond covenants, which the utility was offering or the effect of the sale on the purchaser; they were complaining about the purpose of the issue, which was to further a conspiracy to allow the monopolization of electric power. It is that complaint which this Court held that the Commission must inquire into, and it is the same kind of complaint which has been presented in this case.

(B) The case is important to the proper administration of the Federal Power Act. It is part of a line of cases by which the Federal Power Commission has sought to disable itself from administering the Act in a manner consistent with the antitrust laws.

In the *City of Paris v. Kentucky Utilities Co.,* 41 FPC 44 (1969) the Commission held that it could not order wheeling in order to eliminate anticompetitive conduct. In *Gainesville Utilities Department v. Florida Power Corp.,* 40 FPC 1227 (1968), 41 FPC 4 (1969), the Commission held that it could not condition an interconnection order against duplication of facilities, to avoid anticompetitive effects.

In *Gulf States Utilities,* 44 FPC 1524 (1970) the Commission held that it could not require a utility to

abandon a conspiracy to suppress an interconnection and pooling agreement for anticompetitive purposes as a condition to the approval of a securities issue. In *Arkansas Power & Light Co.,* 50 FPC 1289, 1293 (1973) the Commission held that it had no authority to prevent a price squeeze, under which a city had to pay higher rates for wholesale service than the utility charged its retail customers, alleged to.

And now in this case the Commission holds that it cannot invalidate or reform a contract which is part of a plan to monopolize wholesale power sources.

Even more striking is the absence of any Commission decision taking any action to eliminate anticompetitive conditions in the electric industry. The Commission has given devoted words to its concern over antitrust violations, but has yet to find in any particular case that it had jurisdiction to effect a change.

This Court gave the Commission a check in the *City of Lafayette* case, *Gulf States Utilities v. Federal Power Commission,* 411 U.S. 747 (1973); and the Court of Appeals has reversed the *Arkansas Power & Light Co.* case, *Conway Corporation v. Federal Power Commission* (D. C. Cir., No. 73-2207, decided April 4, 1975, not yet officially reported), but the Commission is considering whether to seek a review to this Court. The Court of Appeals there said that the "Federal Power Act does not contemplate that the FPC is to operate in an airtight chamber, insulated from nonjurisdictional factors." (p. 133 of slip opinion) It pointed out that section 311 of the Federal Power Act (16 U.S.C. 825j) authorizes and directs the FPC

> ". . . to conduct investigations regarding the generation . . . of electric energy . . . whether or not subject to the jurisdiction of the Commission, including the generation . . . of electric energy by an agency . . . of any . . . municipality or other political subdivision of the State."

In *Gulf States,* this Court said that Title II of the Federal Power Act,

> ". . . was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies." (411 U. S. at 758)

and that the Commission was vested "with important and broad regulatory power in the areas described above" (ibid.).

Here, however, the Commission somehow regards the fact that PG&E has contracted with SMUD, a public agency of the State, as immunizing the contract from all those important and broad regulatory powers. It is clear that the Commission is continuing to avoid the obligation which this Court has said the Congress intends it to exercise.

In this case, NCPA asked that the contract which PG&E had entered into with SMUD be declared unjust and unreasonable, against the public interest and in violation of the antitrust laws. This is exactly what section 206 of the Federal Power Act (App. A, p. 4) contemplates. NCPA suggested alternatively that PG&E could get the same amount of electric power

it had contracted for from SMUD if the parties to the agreement agreed to enlarge the plant. The Commission's authority to grant relief was to order PG&E to eliminate the provisions of the agreement which created and maintained a monopoly. Reference to the alternate way of clearing up the problems presented by the contract as an excuse for failing to exercise the jurisdiction it had is the Commission's way of continuing the pattern of refusing to grant relief in antitrust situations.

In *Georgia Power Company v. Federal Power Commission,* 373 F.2d 485 (C. A. 5, 1967), the Court upheld the action of the Commission in deleting "from certain wholesale electric energy schedules those provisions relating to resale load ceiling and small resale credits." (p. 486) The Commission determined the "lawfulness of the restrictive service provisions" and "did not question whether Georgia Power's schedule of filed rates to municipalities were unjust or unreasonable for reasons of rate level." (ibid.) Thus it is apparent that the Commission can change portions of rate schedules, or contracts, surely, with state agencies without changing the rate itself.

The authority of the Federal Power Commission to grant relief to NCPA derives from the words of section 206 of the Federal Power Act (App. A, p. 4). If the Commission, after hearing, determines that any contract affecting a rate is unjust or unreasonable, it shall determine the just and reasonable contract, and "fix the same by order." NCPA does not ask the Commission to do more, or less, than that which the statute prescribes.

CONCLUSION

Petitioner NCPA asks that this Court grant a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia affirming a decision of the Federal Power Commission dismissing NCPA's complaint against the anticompetitive provisions of a contract affecting a rate under section 205 of the Federal Power Act, on the ground that the matter presented is of importance to the application of the federal antitrust laws and the Federal Power Act to the electric power industry, and that the decision of the Commission in avoiding a decision on the issues presented by NCPA's complaint is contrary to those laws.

Dated, Sacramento, California,
June 25, 1975.

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(Appendices Follow)

APPENDIX

FEDERAL POWER ACT

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Rates and charges.

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

Undue preference or advantage. Maintenance of unreasonable rates or service.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

Schedules of rates and charges.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together

Schedules open to public inspection.

with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

Changes in schedules prohibited.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classifications, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851-852; 16 U.S.C. 824d(d)]

Filing of new schedules.

Public notice.

New schedules.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension,

Hearings.

may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824d(e)]

Commission may suspend operation of new schedule.

Refund of increased rates and charges.

Burden of proof in rate matters.

Rate investigations have preference.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTIION OR TRANSPORTATION

Commission upon own motion or complaint may determine reasonable rates, etc.

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e(a)]

Investigation and determination of cost of production and transmission.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e(b)]

Appendix B

United States of America
Federal Power Commission

Before Commissioners:

John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr., John A. Carver, Jr.,
Albert B. Brooke, Jr., and Pinkney Walker.

Pacific Gas and Electric Company	Docket No. E-7597

ORDER ACCEPTING PROPOSED RATE SCHEDULES, GRANTING WAIVER OF NOTICE REQUIREMEMNTS, AND DISMISSING COMPLAINT

(Issued June 8, 1971)

Pursuant to Sections 35.12 and 35.13 of the Commission's Regulations under the Federal Power Act (18 CFR 35.1), Pacific Gas and Electric Company ("Pacific"), a public utility subject to the jurisdiction of this Commission, filed on December 18, 1970, an amendment ("Supplement No. 1 to FPC Electric Rate Schedule No. 34"), dated June 4, 1970, to the 1966 Sale and Interchange Contract between Pacific and Sacramento Municipal Utility District ("Sacramento"), and a new agreement ("FPC Electric Rate Schedule No. 45"), dated June 4, 1970, between Pacific and Sacramento. The filing of Supplement No. 1 to FPC Electric Rate Schedule No. 34 is proposed to

be effective January 21, 1971. The FPC Electric Rate Schedule No. 45 is to become effective upon commercial operation of Rancho Seco Unit No. 1 and continue until 1993, unless terminated by either party upon six years written notice. The Supplement No. 1 to FPC Electric Rate Schedule No. 34 and the FPC Electric Rate Schedule No. 45 are identified in Appendix A attached hereto.

FPC Electric Rate Schedule No. 45 provides for the continued integration of facilities between Pacific and Sacramento. The new schedule provides for the construction and operation of Sacramento's Rancho Seco Unit No. 1, and a second thermal plant. FPC Electric Rate Schedule No. 45 will not become effective, until the date Rancho Seco Unit No. 1 becomes commercially operable; at which such time, that schedule will supersede the 1966 agreement (FPC Electric Rate Schedule No. 34).

The proposed FPC Electric Rate Schedule No. 45 provides for the sale of surplus energy from Rancho Seco Unit No. 1, by Sacramento to Pacific, at a price of Sacramento's production cost plus ten percent, but not more than 1.9 mills per kilowatt hour. Pacific is to purchase surplus capacity from the first nuclear unit at the cost of capacity from the unit, but not to exceed twenty-six dollars per kilowatt per year. Beginning in 1977 and until the second nuclear unit is installed, Sacramento will require capacity from Pacific, such capacity to be returned to Pacific from Sacramento's first capacity surplus. Sacramento will

also contribute monthly capacity to Pacific in exchange for standby service and will, in addition, receive backup in exchange for its contribution to Pacific's generation reserves. Pacific and Sacramento also provide for an energy exchange account. Finally, Pacific and Sacramento will construct transmission facilities for the first unit's energy.

The Supplement No. 1 to FPC Electric Rate Schedule No. 34 provides for the transition from the present rate schedule to the proposed FPC Electric Rate Schedule No. 45. Prior to Rancho Seco Unit No. 1 becoming commercially operable, Sacramento will be credited with energy in meeting its load requirements, thereby reducing its purchases from Pacific. There are to be no changes in the filed rate under this amendment.

The proposed rate schedule (FPC Electric Rate Schedule No. 45), filed on December 18, 1970, will take effect beyond the 90 (ninety) day maximum notice period, as provided by Section 35.3 of the Commission's regulations under the Federal Power Act. Pacific, concurrently with this filing, has requested a waiver of this notice requirement. We find, it is important to Pacific, Sacramento, and their customers, that the notice requirement be waived. In order to facilitate joint planning between Pacific and Sacramento, and in order to give assurance to those financing Sacramento's construction program, we find there is good cause to waive the notice requirements of Section 35.3 of the Commission's regulations under the Federal Power Act.

As provided in Section 35.3 of the Commission's regulations under the Federal Power Act, we will provide that Supplement No. 1 to FPC Electric Rate Schedule No. 34, filed December 18, 1970, shall become effective January 21, 1971, thirty days after the filing date.

On January 12, 1971, Northern California Power Agency ("Northern") filed a complaint with this Commission, alleging certain antitrust violations and anticompetitive acts and practices, arising out of FPC Electric Rate Schedule No. 45 and Supplement No. 1 to FPC Electric Rate Schedule No. 34. In particular, complainant alleges that Northern was intentionally excluded from the planning and agreement stages of the proposed second nuclear unit, Pacific is attempting to monopolize the generation of electrical energy in northern and central California by limiting the size of the second nuclear unit, and Northern has been intentionally excluded from being able to purchase bulk nuclear power. These acts and practices, among others, are alleged to grant an undue preference to Pacific, in violation of Section 205(b) of the Federal Power Act, and are therefore, alleged to be unlawful, under Section 205(a) of that Act. Northern, in its complaint, has asked for a hearing, and has requested this Commission to void FPC Electric Rate Schedule No. 45, or to amend said agreement, to increase the size of the proposed second nuclear unit to 1,150 mw; the excess over 830 mw to be made available to Northern for purchase. Pacific has filed, on February 25,

1971, an Answer to Northern's Complaint. On March 12, 1971, Northern filed its Reply to Pacific's Answer.

We find, for the reasons stated herein, that this Commission is without jurisdiction to hear Northern's complaint. We therefore decline to comment on the merits of Northern's allegations inasmuch as they are deemed moot.

Sacramento is a public agency of the State of California and not subject to the jurisdiction of this Commission. On October 10, 1968, Sacramento was granted a provisional construction permit by the Atomic Energy Commission (AEC)[1] for Rancho Seco Nuclear Unit No. 1. There were no intervenors at the hearings provided by the AEC on issuance of that permit. Once a project is determined to be "useful for industrial or commercial purposes", a commercial license will issue under the Atomic Energy Act.[2] Section 105 of that Act[3] gives the AEC power to revoke or suspend licenses where the licensee may be in violation of an antitrust statute, empowers the AEC to report to the Attorney General any antitrust violations, and the AEC must send all Section 103 licenses to the Attorney General for an antitrust review.[4] If there is determined to be adverse antitrust consequences, the Attorney General will report the

[1]AEC Docket No. 50-312.

[2]1970 Amendments to Section 102 of Atomic Energy Act, 42 U.S.C. §2132 and Section 103, 42 U.S.C. §2133.

[3]42 U.S.C. §2135.

[4]Ibid.

same to the AEC, after which the AEC must hold a hearing. Where a construction permit issued prior to December 19, 1970, any party who intervened or sought to intervene, may, within 25 days after notice of filing for a Section 103 operating license, request an antitrust review by the Attorney General.[5] Under Section 105 of the Atomic Energy Act, the AEC has the power to condition any licenses which it has issued, in order to correct any potential antitrust abuses.[6]

We find that the Atomic Energy Act, and the 1970 Amendments thereto, indicate a close liaison between the AEC and the Attorney General, to investigate and remedy any potential antitrust violations in the licensing procedures of nuclear generating facilities.

We find it unmistakingly clear, that Section 201(b) of the Federal Power Act, carefully limits our authority and that our jurisdiction does *not* extend to the "facilities" used for the generation of electrical energy. Although we are mindful of Section 271 of the Atomic Energy Act, which states that normal federal, state, and local regulatory authority over the generation, sale, and transmission of electric energy shall continue, we do not find that the Federal Power Act should be amended by "implication", so as to give this Commission certificate jurisdiction over the facilities of Sacramento.

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[5]Ibid.
[6]Ibid.

We are dealing with a complaint, which does not allege rate discrimination, nor does it allege that the proposed rates are unjust or unreasonable. Northern has requested this Commission to exercise jurisdiction over the size of a nuclear generating unit and to allocate the bulk power generated therefrom, such unit being subject to the licensing provisions of the Atomic Energy Act, and such unit being owned and financed by a government agency of the State of California. We find this Commission has no such jurisdiction.

The Commission further finds:

(1) FPC Electric Rate Schedule No. 45 and Supplement No. 1 to FPC Electric Rate Schedule No. 34, dated June 4, 1970, between Pacific and Sacramento, are just and reasonable and otherwise lawful under the Federal Power Act.

(2) Good cause has been shown to waive the notice requirements to Section 35.3 of the Commission's Regulations under the Federal Power Act (18 CFR 35.3) to permit Pacific to file FPC Electric Rate Schedule No. 45 at this time.

The Commission orders:

(A) Waiver of the notice requirements of Section 35.3 of the Commission's Regulations under the Federal Power Act (18 CFR 35.3) is hereby granted so as to allow Pacific to file FPC Electric Rate Schedule at this time to become effective upon commercial operation of Rancho Seco Unit No. 1.

(B) Supplement No. 1 to FPC Electric Rate Schedule No. 34 is to be effective January 21, 1971.

(C) Northern's complaint is hereby dismissed and these proceedings terminated.

By the Commission.

(Seal)

Kenneth F. Plumb,
Acting Secretary.

United States of America
Federal Power Commission

Pacific Gas and Electric Company	Docket No. E-7597

ERRATA NOTICE

(August 30, 1971)

ORDER ACCEPTING PROPOSED RATE SCHEDULES, GRANTING WAIVER OF NOTICE REQUIREMENTS AND DISMISSING COMPLAINT

(Issued June 8, 1971)

1. Page 1, in the fourth line of the first paragraph, change the words "filed on December 18, 1970" to "filed on December 21, 1970".

2. Page 3, starting on the third line of the first full paragraph, change the words "filed December 18, 1970" to "filed December 21, 1970".

Kenneth F. Plumb,
Secretary.

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Lawrence J. O'Connor, Jr., John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Walker

Pacific Gas and Electric Company	Docket No. E-7597

ORDER GRANTING REHEARING FOR FURTHER CONSIDERATION

(Issued August 3, 1971)

Northern California Power Agency, on July 6, 1971, filed a petition for rehearing of the order issued in this docket on June 8, 1971, accepting rate schedules proposed by Pacific Gas and Electric Company (Pacific), waiving certain notice requirements, and dismissing on jurisdictional grounds petitioner's complaint under Section 205 of the Federal Power Act, 16 U.S.C. 824d.

Petitioner challenges the findings made in support of the dismissal of its complaint, and reiterates its requests for suspension of the rate schedules filed by Pacific and for a hearing on the allegations of its complaint.

The Commission finds:

It is appropriate and in the public interest in administering Part II of the Federal Power Act that the aforesaid petition of Northern California Power Agency for rehearing of the order issued in Docket No. E-7597 be granted as hereinafter provided.

The Commission orders:

The aforesaid petition of Northern California Power Agency for rehearing is granted for purposes of further consideration.

By the Commission.

(Seal)

Kenneth F. Plumb,
Secretary.

Appendix D

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Pacific Gas and Electric Company	Docket No. E-7597

ORDER DENYING REHEARING

(Issued May 15, 1973)

This proceeding is before the Commission upon an application for rehearing of an order of the Commission issued June 8, 1971, 45 FPC 1153 Order Accepting Proposed Rate Schedules, Granting Waiver of Notice Requirements and Dismissing Complaint. The rate schedules embody two contractual agreements filed by Pacific Gas and Electric Company (PG&E) on December 21, 1970.[1] The Commission dismissed the complaint of the Northern California Power Agency (NCPA) finding that complainant (45 FPC 1155):

> * * * has requested this Commission to exercise jurisdiction over the size of a nuclear generating unit and to allocate the bulk power generated therefrom, such unit being subject to the licensing provisions of the Atomic Energy Act, and such unit being owned and financed by a government agency of the State of California. We find this Commission has no such jurisdiction.

[1]The agreements are designated as PG&E's Rate Schedule No. 34, Supplement No. 1; and Rate Schedule No. 45.

The subject agreements were executed on June 4, 1970, between PG&E and the Sacramento (California) Municipal Utility District (SMUD). The agreements provide for the continued integration of facilities between PG&E and SMUD and provide further for the sale by SMUD to PG&E of all excess capacity and energy generated by the Rancho Seco No. 1 nuclear power generating plant which SMUD has constructed in Sacramento County, California. In addition, the agreements provide that under certain circumstances SMUD shall construct an additional thermal generating plant at the Rancho Seco site and shall sell the excess output of such plant to PG&E. PG&E requested that the contracts be accepted as rate schedules and made effective on January 21, 1971, 30 days after filing.

On January 12, 1971, NCPA, consisting of 11 California cities located within PG&E's service area, filed its complaint against the PG&E-SMUD contracts, alleging, *inter alia,* that such contracts (1) would prevent NCPA from planning with SMUD for joint participation in the financing and construction of power generation, (2) are part of a plan by PG&E to monopolize the supply of electric energy in northern and central California, and (3) grant an undue preference to PG&E and are therefore unlawful under the Federal Power Act. PG&E answered the complaint on February 25, 1971. On June 8, 1971, the Commission issued its order accepting PG&E's proposed rate schedules. In doing so, the Commission considered NCPA's complaint. NCPA applied for rehearing of

the Commission order on July 6, 1971. On August 3, 1971, the Commission granted rehearing for purposes of further consideration.

The grounds upon which NCPA seeks rehearing of the Commission's June 8, 1971 order[2] evidence a misconception of the Commission's findings and conclusions relative to the complaint and the relief which NCPA seeks. The Commission has regulatory jurisdiction over PG&E, including *inter alia* jurisdiction over all of the company's transactions involving interstate transmissions sales of electric energy at wholesale for resale. 16 U.S.C. 824 (b)(c), 824 d, 824 e. PG&E is a "public utility" within the meaning of the Federal Power Act, 16 U.S.C. 824 (e); *Cf. F.P.C. v. Florida Power & Light Co.,* 404 U.S. 453 (1972). SMUD, an agency of the State of California, is not a "public utility" 16 U.S.C. 824 (f). In the exercise of that regulatory jurisdiction the Commission necessarily considers anti-competitive factors which fall therein. See *Southern California Edison Company,* ..... FPC ....., Opinion No. 654, issued March 19, 1973.

[2]These are stated as follows:
• • • The Commission erred in finding that it is without jurisdiction to hear • • • [NCPA's] complaint • • • (Application for Rehearing pp. 1-2); • • • erred in considering as material • • • that Sacramento as a public agency • • • California is not subject to the jurisdiction of the Commission • • • Ibid p. 2; • • • erred in finding • • • that the Atomic Energy Act • • • provides a remedy for • • • complaint • • • Ibid p. 3; • • • erred in finding • • • a lack of jurisdiction because of the limitations of Section 201(b) of the Federal Power Act • • • Ibid p. 6; • • • erred in finding • • • that the contracts and rates • • • are just and reasonable and otherwise lawful • • • without considering the allegations made by • • • [NCPA] • • • Ibid p. 7; and • • • erred in finding • • • that • • • [NCPA] has requested this Commission to amend the agreement between Pacific and Sacramento • • • Ibid p. 8.

The Commission's order of June 8, 1971, does not fail to consider NCPA's complaint. It does so expressly and concludes that legal jurisdictional reasons preclude the Commission from granting the substantive relief which NCPA seeks. 45 FPC 1155. Under Parts II and III of the Federal Power Act, 16 U.S.C. 824-825r, the Commission's regulatory jurisdiction does not include authority to license or certificate fossil fired electric generating stations or nuclear electric generating stations, nor include as a part thereof any administrative authority to direct the size of a particular generating facility or authority to direct investment control or ownership of a portion of generating unit of one utility by another. These concepts are the essence of the relief which NCPA seeks.

The Commission's licensing jurisdiction is confined to hydroelectric facilities under Part I of the Federal Power Act, 16 U.S.C. 792-823, *F.P.C. v. Union Electric Co.,* 381 U.S. 90, 110 (1965); *The Chemehuevi Tribe of Indians v. Arizona Public Service Company,* 46 FPC 1126, 1127 (1971); *Pacific Power & Light Company,* 27 FPC 623, 626 (1962).

In the enactment of Part II of the Federal Power Act, Congress directed the Commission to approach the general questions of expanded electric generating capacity and regional coordination of bulk power supply facilities through the consultative and cooperative procedures of Section 202a which are directed to the overall questions of adequacy and reliability of bulk power supply, 16 U.S.C. 824a(a). The Congress thus recognized the basic utility responsibility of all

electric systems, investor owned, publicly owned and cooperatively owned, to include, as a primary initial duty of utility management, an obligation to plan for adequacy and reliability of bulk power supply. *Pa. W & P Co. v. Consolidated G., E., L., & P. Co.,* 184 F2d 552, 567 (CA4) cert denied 340 U.S. 906 (1950). Part II of the Federal Power Act, as it relates to the Commission's interconnection and service regulatory authority provides that " * * * the Commission shall have no authority to compel the enlargement of generating facilities for such purposes * * * ", 16 U.S.C. 824 a (b), 824 f; *Otter Tail Power Company v. F.P.C.,* .....F2d ....., CA8, No. 72-1088, Opinion filed February 21, 1973.

NCPA's Complaint does not propose specific coordination or power pooling arrangements which it seeks to implement either with PG&E or SMUD. The policies and practices of the Commission are designed to afford all electric systems opportunity for coordinated regional bulk power supply planning. See *Gainesville Utilities Department,* 40 FPC 1227, 1233 (1968) affirmed *sub nom, Gainesville Utilities Department v. Florida Power Corporation,* 402 U.S. 515 (1971); *Pennsylvania Water & Power Co.,* 8 FPC 1, 170, 175-7 (1949), affirmed, *Pennsylvania Water & Power Co. v. FPC,* 343 U.S. 414, 422-3 (1952); *Village of Elbow Lake,* 46 FPC 675, 678 (1971) reversed in part on other grounds, *sub nom, Otter Tail Power Company v. F.P.C.,* .....F2d ..... (CA8, No. 72-1088) Opinion filed February 21, 1973; *Village of Elbow Lake,* 40 FPC 1262 (1968) affirmed *sub nom*

Otter Tail Power Company v. F.P.C., 429 F2d 232, 234 (CA8, 1970), *cert denied,* 401 U.S. 947 (1971); *Alabama Electric Cooperative v. Alabama Power Company,* 38 FPC 962, 972 (1967); *Public Service Company of Oklahoma,* 25 FPC 656, 659 (1961); and the Commission's 383 Series orders Statement of Policy, Reliability and Adequacy of Electric Service—Reporting of Data—Participation of Regulatory Personnel in Regional Councils, Order 383-3, issued March 15, 1973, ... FPC .....; Order 383-2, 43 FPC 515 (1970); Order 383-1, 43 FPC 37 (1970); Order 383, 41 FPC 846 (1969).

The Commission's Elbow Lake decision is particularly helpful in this respect[3] in summarizing appropriate underlying power pooling and coordination principles. Also, it should be noted that the Commission's June 8 order summarizes procedures which apply to NCPA's anti-competitive allegations as they relate to facility licensing authority of the Atomic Energy Commission, 45 FPC 1155. The AEC has referred NCPA's allegations to the Attorney General "* * * pursuant to Section 105b of the Atomic Energy Act * * *." AEC Memorandum and Order dated April

[3]The Commission stated, 46 FPC 678 in part:
* * * We do not * * * accept a captive market concept * * * The public interest is far broader than the economic interest of a particular power supplier. It is our legal responsibility, as the Supreme Court made clear in *Pennsylvania Water & Power Co. v. F.P.C.* * * * to use our statutory authority to assure "an abundant supply of electric energy throughout the United States", and particularly to use our statutory power * * * to compel interconnection and coordination when the public interest requires it. * * * This Commission's opinion in the *Gainesville* case, * * * will be helpful in those circumstances. * * *

18, 1973, *In the Matter of Sacramento Municipal Utility District,* Docket No. 50-312 A. p. 3 mimeo. ed).

The Commission further finds:

(1) Upon the foregoing further review and consideration of the position of NCPA as set forth in its complaint and its application for rehearing, the Commission finds no basis for changing its actions of June 8, 1971.

(2) It is necessary and appropriate for the purposes of the Federal Power Act, particularly Sections 205, 206 and 309, 16 U.S.C. 824d, 824e and 825h, to order as hereinafter provided.

The Commission orders:

(A) Rehearing of the Commission's order of June 8, 1971 as referred to above, is hereby denied.

(B) PG&E shall file with this Commission, as rate schedule changes, subject to the regulatory jurisdiction of the Commission, any revisions in the agreements embodied in PG&E's Rate Schedule FPC No. 34, Supplement No. 1 and Rate Schedule FPC No. 45, all in the manner provided in the Commission's Regulations under the Federal Power Act, 18 CFR 35.1, *et seq.*

By the Commission.

(Seal)

Kenneth F. Plumb,
Secretary.

Appendix E

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1974

No. 73-1765

Northern California Power Agency
A Joint Powers Agency of the
State of California, Petitioner

v.

Federal Power Commission, Respondent
Pacific Gas & Electric Company, Intervenor

Petition for Review of an Order of the Federal Power Commission

Before: TAMM and MACKINNON, Circuit Judges, and MERHIGE,* United States District Judge for the Eastern District of Virginia

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

Ordered and Adjudged by this Court that the orders of the Federal Power Commission on review

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Date: March 6, 1975

Opinion for the Court filed by Circuit Judge Tamm.

United State Court of Appeals
for the District of Columbia Circuit

Filed March 6, 1975
Hugh E. Kline
Clerk

Appendix E

Appendix F

United States Court of Appeals
for the District of Columbia Circuit

No. 73-1765

Northern California Power Agency, Petitioner

v.

Federal Power Commission, Respondent
Pacific Gas & Electric Company, Intervenor

Petition for Review of an Order of the
Federal Power Commission

Decided March 6, 1975

Martin McDonough, with whom *Bruce McDonough* was on the brief for petitioner.

Thomas M. Walsh, Attorney, Federal Power Commission, with whom *Leo E. Forquer,* General Counsel and *George W. McHenry, Jr.,* Solicitor, Federal Power Commission, was on the brief for respondent.

Malcolm H. Furbush, Daniel E. Gibson and *Howard V. Golub* were on the brief for intervenor.

Before: TAMM and MACKINNON, *Circuit Judges* and MERHIGE,* *United States District Judge* for the Eastern District of Virginia

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* On June 4, 1970, the Pacific Gas and Electric Company (PG&E) and the Sacramento Municipal Utility District (SMUD) entered into a "Power Sale, Exchange and Integration Contract" and an "Amendment to 1966 Revised Sale and Interchange Contract." Petitioner, Northern California Power Agency (NCPA) seeks review of two orders of the Federal Power Commission (Commission) which denied petitioner's request for a hearing on the antitrust implications of the PG&E-SMUD contracts which were subsequently filed as rate schedules with the Commission by PG&E. We think that the Commission's actions in this case were proper and accordingly, affirm its orders.

NCPA is a public agency created under California law by a joint powers agreement among eleven California cities, each of which owns and operates an electric distribution system supplying electric power to consumers within its boundaries. NCPA, whose members currently purchase part of their electric power from PG&E, has adopted and seeks to implement, through joint participation with other organizations, a program to provide generation of electric power supplemental to its members' present sources.[1] PG&E is a California corporation which owns and operates a public utility electric generation, transmission and distribution system throughout northern and central California, including the areas within which each of NCPA's members is located. PG&E's

[1]Joint Appendix II. at 135-36 [hereafter J.A.].

sales for resale of electric power in interstate commerce are subject to regulation by the Commission. 16 U.S.C. § 824(b) (1970). SMUD, a public agency of the State of California, owns and operates an electric generation, transmission and distribution system in the same northern California area as PG&E. All parties agree that the Commission is precluded from asserting jurisdiction over SMUD. *See* 16 U.S.C. §§ 824(b), (f).[2]

In 1970, PG&E and SMUD entered into contracts providing that SMUD would construct a nuclear powered electrical generating plant and sell to PG&E all capacity and energy generated in excess of that used

[2]16 U.S.C. §§ 824(b), (f) read as follows:

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

. . . .

(f) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. (June 10, 1920, ch. 285, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847.)

by SMUD. The contracts also required that SMUD, under certain circumstances, would schedule the construction of a second thermal power plant from which PG&E would buy and SMUD would sell all output in excess of that used by SMUD. Additionally, the contracts provided that PG&E would make certain essential capacity and service available to SMUD. Because the sale from PG&E to SMUD was a sale of electric energy at wholesale in interstate commerce, PG&E filed the contracts with the Commission as rate schedules pursuant to section 205(c) of the Federal Power Act, 16 U.S.C. § 824d(c). Subsequently, NCPA filed its complaint with the Commission.

The gravamen of NCPA's complaint was that the PG&E-SMUD contracts were part of a scheme by PG&E to monopolize the generation of electric power in northern and central California. Thus, NCPA requested that the Commission suspend the contracts, require an answer to its complaint, and hold a hearing on the issues presented. In terms of specific relief, NCPA sought Commission findings.

> (a) that the June 4, 1970, contracts are unjust and unreasonable, and therefore unlawful, against the public interest, and in violation of the antitrust laws, and void, insofar as they purport to empower PG&E to exclude NCPA from any participation in SMUD's electric power generation; (b) that such contracts may be approved if they are amended to provide (i) for the increase in capacity of Thermal Unit No. 2 to approximately 1,150,000 kilowatts, or such larger size as the parties may agree to, with that portion of the capac-

> ity in excess of 830,000 kilowatts made available to NCPA through NCPA financing or contractual commitment for the life of the unit; (ii) for an agreement between NCPA and PG&E for the use of such increased capacity for reserves, maintenance and overhaul, delivery to NCPA members, and dispositions of surplus; and (iii) for consideration of the possibility of NCPA utilizing a part of SMUD's surpluses between the time Rancho Seco No. 1 [the first thermal plant] goes into commercial operation and prior to commercial operation of Thermal Unit No. 2 . . . .

J.A. II, at 140-41. PG&E answered the complaint, denying NCPA's essential assertions, and NCPA replied.

On June 8, 1971, the Commission issued an order which, *inter alia,* accepted PG&E's proposed rate schedules and dismissed NCPA's complaint. 45 FPC 1153 (1971). The Commission, recognizing that SMUD, a public agency of the State of California, is not subject to the Commission's jurisdiction and further, "that section 201(b) of the Federal Power Act, [16 U.S.C. § 824(b)], carefully limits [Commission] authority and that [Commission] jurisdiction does *not* extend to the 'facilities' used for the generation of electrical energy," *id,* at 1155, decided it was without jurisdiction to hear NCPA's complaint. The Commission did, however, note the relevance of the then Atomic Energy Commission's jurisdiction in such matters and discussed AEC's remedial powers, exercised cooperatively with the Attorney General, to correct such potential antitrust abuses. *Id.* Summarizing the proceedings to that point, the Commission stated:

> We are dealing with a complaint, which does not allege rate discrimination, nor does it allege that the proposed rates are unjust or unreasonable. [NCPA] has requested this Commission to exercise jurisdiction over the size of a nuclear generating unit and to allocate the bulk power generated therefrom, such unit being subject to the licensing provisions of the Atomic Energy Act, and such unit being owned and financed by a government agency of the State of California. We find this Commission has no such jurisdiction.

Id. The Commission then found the rate schedules just and reasonable and otherwise lawful under the Act and dismissed NCPA's complaint. NCPA promptly sought rehearing, which the Commission granted for purposes of further consideration on August 3, 1971. Almost two years later, the Commission issued its final order denying NCPA's requested rehearing and stated again that it was simply without jurisdiction to remedy the alleged anticompetitive effects of the contracts. 49 FPC 1103-04 (1973). NCPA petitioned for review in this court.

At the outset, NCPA asserts that section 205, 16 U.S.C. § 824d, necessitates the Commission's consideration of the antitrust implications of contracts filed as rate schedules. NCPA argues that this consideration is required because: the mandate of section 205 is broad; the Commission has previously agreed that allegations of anticompetitive conduct are relevant to rate making under section 205; the policy of the Federal Power Act is consistent with enforcement of antitrust principles in section 205 proceedings; and,

the courts have consistently required regulatory agencies to consider the anticompetitive consequences of actions they are asked to approve. Petitioner's Br. at 9-22. Generally speaking, we are in full accord with petitioner's arguments. The Supreme Court and this court have held, time and again, that the Federal Power Commission, as other regulatory agencies, must consider the anticompetitive consequences of matters properly before it. *See, e.g., Gulf States Utilities Co. v. FPC,* 411 U.S. 747, 756-62 (1973), *aff'g sub nom., City of Lafayette, Louisiana v. SEC,* 454 F.2d 941 (D.C. Cir. 1971); *Denver & Rio Grande Western R.R. Co. v. United States,* 387 U.S. 485, 492-98 (1967); *California v. FPC,* 369 U.S. 482 (1962); *McLean Trucking Co. v. United States,* 321 U.S. 67 (1944); *City of Huntingburg, Indiana v. FPC,* 498 F.2d 778, 783-89 (D.C. Cir. 1974); *Northern Natural Gas Co. v. FPC,* 399 F.2d 953, 959-61 (D.C. Cir. 1968). That the doctrine is by now fully engrained in our jurisprudence is beyond question. Indeed, the Commission concedes the doctrine's general applicability in its brief to this court, Commission's Br. at 14-15, and in its order denying rehearing in this case which stated that "the Commission necessarily considers anti-competitive factors which fall [within its jurisdiction]." 49 FPC 1103, 1104. Of course, this is not to say that the doctrine is without limits or that the Commission must hold "hearings" on every complaint alleging antitrust violations. Thus, we turn to the crucial issue in this case—whether the denial of NCPA's request for a hearing on the alle-

gations in its complaint constituted an abuse of the Commission's discretion.

In *City of Lafayette, supra,* 454 F.2d 941, this court reviewed orders of the Federal Power and Securities and Exchange Commissions in which the petitioners had complained "that the agencies failed to take proper account of their claims that the proceeds [from the issuance of bonds, notes and stock to finance capital requirements of several utility Companies] would be used for the Companies' unlawful conspiracy to suppress competition." *Id.* at 943. Concluding that the FPC's reasons for denying a hearing did not comply with the requirement of *Denver & Rio Grande, supra,* "that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion." Judge Leventhal, speaking for the court, then outlined the Commission's duty on remand:

> [W]e think it appropriate to say expressly that an agency is not required to hold hearings in matters *where the ultimate decision will not be enhanced or assisted by the receipt of evidence.* And as to interventions raising anti-competitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren to indicate the existence of substantial anticompetitive issues, *or to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application.*

Id. at 953 (emphasis added, citations omitted). Later, addressing the issue as to the SEC, the court went on to state that:

> Where an agency has some regulatory jurisdiction over operations, it must consider whether there is *a reasonable nexus between the matters subject to its surveillance and those under attack on anti-competitive grounds.* But the general doctrine requiring an agency to take account of antitrust considerations *does not extend* to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, *has not been given any regulatory jurisdiction over operations of the company.*

Id. at 955 (emphasis added).

City of Lafayette was subsequently affirmed *sub nom.* by the Supreme Court in *Gulf States, supra,* 411 U.S. 747, where the Court quite plainly noted that the Commission's broad regulatory "power clearly carries with it the responsibility to consider, *in appropriate circumstances,* the anticompetitive effects of *regulated aspects of interstate utility operations* pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207." *Id.* at 758-59 (emphasis added). However, the Court also recognized the Commission's discretion to dispose summarily of anticompetitive objections, cautioning that in such situations

> "the reviewing court must closely scrutinize its action in light of the . . . statutory obligations to

> protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral" or summary treatment.

Id. at 763, *quoting, Denver & Rio Grande, supra,* 387 U.S. at 498. Essentially, what the Commission must provide is a properly reasoned explanation for its summary disposition. We think the Commission has done so in the case before us.

Here, NCPA challenged the PG&E-SMUD contracts "insofar as they purport to empower PG&E to exclude NCPA from any participation in SMUD's electric power generation." J.A. II. at 141. However, NCPA did not allege rate discrimination or that the proposed rates were unjust or unreasonable. It did not even assert that the proposed rates were somehow a part of PG&E's alleged anticompetitive "scheme". NCPA sought only to have the contracts held unlawful unless and until they provided for increased capacity of SMUD's thermal units for NCPA's use. *Id.* The Commission simply does not possess the authority to order such capacity increases in SMUD's nuclear plants.

NCPA responds to this analysis by maintaining that it did not ask the Commission to exercise jurisdiction over SMUD but rather, to exercise the jurisdiction it does have over PG&E to hold the contracts unlawful. NCPA then asserts that the "contracts could

be made legal" if the Commission ordered them to be amended to accomplish NCPA's requested relief. Petitioner's Reply Br. at 16-17. The clear import of such a procedure would necessitate the Commission doing indirectly what it cannot do directly. The Commission wisely avoided this procedure. *See Central West Utility Co. v. FPC,* 247 F.2d 306 (3rd Cir. 1957).

On the record in this case, we do not think that NCPA met its burden of showing a reasonable nexus between the alleged anticompetitive scheme of PG&E and the activities furthered by the PG&E-SMUD contracts filed as rate schedules. The "transaction" approved here consisted *only* of the rates that PG&E will be charging SMUD. While the consequences of approving the rate schedules could possibly further the alleged anticompetitive scheme, NCPA neither challenged the rates nor asserted their particular relevance to the alleged scheme. Finally, the Commission's jurisdictional reasons for not further investigating NCPA's charges appear well-founded. We question the wisdom of requiring the Commission to investigate that which it has no authority to remedy. Under these circumstances, we cannot say that the Commission's summary disposition of NCPA's complaint was an abuse of discretion.[3]

Affirmed.

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[3]Without intimating any view of the possible merits, *vel non,* of NCPA's allegations against PG&E, we think it appropriate to suggest that existing antitrust laws may well be the most beneficial means of airing NCPA's grievances. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

Supreme Court, U. S.
FILED
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No. 75-11

In the Supreme Court of the United States

OCTOBER TERM, 1975

NORTHERN CALIFORNIA POWER AGENCY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-35) is reported at 514 F.2d 184. The principal order of the Federal Power Commission (Pet. App. 5-13) and its order denying rehearing (*id.* at 16-22) are reported at 45 FPC 1153 and 49 FPC 1103, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23-24) was entered on March 6, 1975. On May 22, 1975, the Chief Justice extended petitioner's time within which to file a petition for a writ of certiorari to and including July 7, 1975, and the petition was filed on July 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly determined that it lacked authority to remedy the allegedly anticompetitive impact of an agreement between a state agency and a jurisdictional public utility for the purchase and sale of electric energy.

STATUTES INVOLVED

Sections 205 and 206 of the Federal Power Act, as added, 49 Stat. 851, 852, 16 U.S.C. 824d and 824e, are set forth at Pet. App. 1-4.

STATEMENT

1. On June 4, 1970, Sacramento Municipal Utilities District ("Sacramento") entered into contracts with Pacific Gas and Electric Co. ("Pacific") whereby Sacramento agreed to sell to Pacific any excess electric energy from a nuclear generating plant that Sacramento proposed to construct. Sacramento also agreed that it would, under certain specified circumstances, construct a second nuclear generating plant and would sell to Pacific any excess energy from that plant as well. Pacific agreed to provide Sacramento with essential capacity and standby services. In December 1970, Pacific filed the contracts with the Federal Power Commission pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, as amendments to its then effective service agreements with Sacramento.[1]

Petitioner is a public agency composed of 11 California cities that own and operate electric distribution systems and that purchase electric power from Pacific. It filed a complaint with the Commission, alleging that the Sacramento-Pacific contracts were part of an unlawful scheme by Pacific to monopolize the generation of electric energy in northern and central California and that the contracts accordingly violate Section 205 of the Act. Petitioner requested that the Commission hold a hearing on the issues raised in the complaint and urged that the contracts not be approved unless they were amended to mitigate their alleged anticompetitive effects.[2]

[1]Pacific was required to file the contracts with the Commission because its sale to Sacramento was a wholesale sale of electric energy in interstate commerce subject to the Commission's jurisdiction under Section 201 of the Act, 16 U.S.C. 824(b).

The Commission accepted the contracts for filing and dismissed petitioner's complaint for lack of jurisdiction (Pet. App. 5-13). The Commission stated that petitioner's complaint "does not allege rate discrimination, nor does it allege that the proposed rates are unjust or unreasonable" (*id.* at 11). Rather, the complaint asked the Commission "to exercise jurisdiction over the size of [Sacramento's] nuclear generating unit and to allocate the bulk power generated therefrom" (*ibid.*).

The Commission concluded that it "has no such jurisdiction" (*ibid.*). "Sacramento is a public agency of the State of California and not subject to the jurisdiction of this Commission" (*id.* at 9). Moreover, under "Section 201(b) of the Federal Power Act, * * * [the Commission's] jurisdiction does *not* extend to the 'facilities' used for the generation of electrical energy" (*id.* at 10; emphasis in original). Sacramento's nuclear generating unit is subject instead to the licensing jurisdiction of the Atomic Energy Commission (*id.* at 9-10).

[2]The complaint stated (Pet. App. 28-29):

> * * * such contracts may be approved if they are amended to provide (i) for the increase in capacity of Thermal Unit No. 2 to approximately 1,150,000 kilowatts, or such larger size as the parties may agree to, with that portion of the capacity in excess of 830,000 kilowatts made available to * * * [petitioner] for the life of the unit; (ii) for an agreement between [petitioner] and [Pacific] for the use of such increased capacity for reserves, maintenance and overhaul, delivery to [petitioner's] members, and dispositions of surplus; and (iii) for consideration of the possibility of [petitioner] utilizing a part of [Sacramento's] surpluses between the time Rancho Seco No. 1 goes into commercial operation and prior to commercial operation of Thermal Unit No. 2 * * *.

In an order denying rehearing, the Commission stated that, while it "necessarily considers anti-competitive factors" that fall within the scope of its normal regulatory jurisdiction, including its jurisdiction over Pacific's transactions that involve interstate sales of electric energy at wholesale for resale (*id.* at 18), its "regulatory jurisdiction does not include authority to license or certificate * * * nuclear electric generating stations, nor * * * authority to direct the size of a particular generating facility or authority to direct investment control or ownership of a portion of generating unit of one utility by another" (*id.* at 19). Since that is "the essence of the relief which [petitioner] seeks" (*ibid.*), and since the Commission is without authority to grant it, the complaint was dismissed.

2. The court of appeals affirmed (Pet. App. 25-35). It stated, relying on this Court's decision in *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747, that, while "the Federal Power Commission, as other regulatory agencies, must consider the anticompetitive consequences of matters properly before it" (Pet. App. 31), the Commission, in appropriate circumstances, has "discretion to dispose summarily of anticompetitive objections" (*id.* at 33), so long as it provides "a properly reasoned explanation for its summary disposition" (*id.* at 34).

Petitioner "did not allege rate discrimination or that the proposed rates were unjust or unreasonable" and "did not even assert that the proposed rates were somehow a part of [Pacific's] alleged anticompetitive 'scheme'" (*ibid.*). Petitioner "sought only to have the contracts held unlawful unless and until they provided for increased capacity of [Sacramento's] thermal units for [petitioner's] use" (*ibid.*). The Commission, however, "simply does not possess the authority to order such capacity increases in [Sacramento's] nuclear plants" (*ibid.*). In these circumstances, petitioner failed to meet "its burden of showing a reasonable nexus between the alleged anticompetitive scheme * * * and the activities furthered by the * * * contracts filed as rate schedules" (*id.* at 35), and the Commission properly disposed of the complaint summarily.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioner contends (Pet. 6-10) that the decision below is inconsistent with this Court's decision in *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747. But, as the court of appeals correctly pointed out, *Gulf States* "recognized the Commission's discretion to dispose summarily of anticompetitive objections" in appropriate circumstances (Pet. App. 33). Since petitioner's complaint sought relief that is beyond the Commission's authority to grant, and since it failed to show a reasonable nexus between the alleged anticompetitive activity and matters that are properly within the scope of the Commission's regulatory jurisdiction, summary disposition was appropriate. As the court of appeals correctly suggested, the Federal Power Act does not require the Commission "to investigate that which it has no authority to remedy" (*id.* at 35).

2. Petitioner asserts that this case "is a part of a line of cases by which the Federal Power Commission has sought to disable itself from administering the Act in a manner consistent with the antitrust laws" (Pet. 10). The assertion is groundless. As this Court's decision in *Gulf States* establishes, the proper disposition of antitrust issues by the Commission turns on the specific circumstances of each case; its decisions in this area must, therefore, be judged on the basis of individual records. The record here supports the Commission's action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEDERAL POWER COMMISSION AND PACIFIC GAS AND ELECTRIC COMPANY,
Respondents.

Brief of Respondent Pacific Gas and Electric Company in Opposition to Petition for a Writ of Certiorari

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Respondents.

Brief of Respondent Pacific Gas and Electric Company in Opposition to Petition for a Writ of Certiorari

Respondent Pacific Gas and Electric Company hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

1. QUESTION PRESENTED

If the Court were to grant certiorari, the question presented would be:

Did the Federal Power Commission abuse its discretion by accepting a contract for filing under Section 205 of the Federal Power Act, 16 U.S.C. § 824d, without holding a hearing on an intervenor's antitrust charges where the FPC, as explained in its decision, had no jurisdiction to

grant the relief requested by the intervenor, and where there was no reasonable connection between the intervenor's antitrust charges and the contract rates over which the FPC did have jurisdiction?

II. STATEMENT OF THE CASE

A. The Interested Parties.

The respondent Pacific Gas and Electric Company ("PGandE") is a public utility whose sales for resale of electric power are subject to regulation by the respondent Federal Power Commission ("FPC"). PGandE is engaged, *inter alia*, in the generation, transmission, distribution and sale of electric power at wholesale and retail in northern and central California.

The petitioner Northern California Power Agency ("NCPA") is a public agency, created by an agreement among a widely scattered group of California cities, namely Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah. (R. 134-35, 143-55)[1] Each of the member cities is engaged in the distribution and retail sale of electric power to consumers within its boundaries. Neither NCPA nor any of its members owns electric generation or high voltage transmission facilities. All power sold by NCPA members is purchased from the Bureau of Reclamation of the United States Department of the Interior or from PGandE. (R. 134-35)

Sacramento Municipal Utility District ("SMUD") is not a party to this case but is a party to the contracts with PGandE which were accepted for filing by the FPC. SMUD is a public agency of the State of California engaged in the business of supplying electric power in the City of Sacramento and surrounding areas. SMUD is not a member of NCPA, but like NCPA is a public agency exempt from the regulatory supervision of the FPC. Federal Power Act § 201(f), 16 U.S.C. § 824(f). Unlike NCPA or its member cities, SMUD possesses a fully integrated and operational generation, transmission and distribution system. (R. 136-37) SMUD has just completed construction of a large nuclear generating unit, known as Rancho Seco No. 1.

1. References to the record in the court below will be indicated throughout this brief by use of the letter "R" followed by a page reference.

B. The Contracts Approved Below and Their Background.

In order to meet the growing electric power needs of its customers, SMUD decided to construct a large nuclear generating plant. (R. 206) While such a plant would achieve significant economies of scale, SMUD, as a relatively small system, was faced with the related problems of securing financing for its plant, finding a dependable market for the substantial portion of the plant's output that would initially be surplus to SMUD's own needs, and acquiring reserve support when the plant was shut down for any reason. Seeking a solution to these and other problems, SMUD opened negotiations with PGandE in 1966 and agreements were concluded in mid-1970 after approximately five years of arm's-length negotiations between PGandE and SMUD (R. 206-08) A new "Power Sale, Exchange and Integration Contract" and an amendment to the existing contract to provide transition between the old and new arrangements were agreed to. PGandE filed both contracts as rate schedules pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824(d), since its sales to SMUD are subject to FPC regulatory jurisdiction. These contracts, filed with the FPC on December 21, 1970, and denominated respectively "FPC Electric Rate Schedule No. 45" and "Supplement No. 1 to FPC Electric Rate Schedule No. 34" were

the contracts accepted for filing as rate schedules by the FPC below.

The principal agreement, and the only one challenged below, is the Power Sale, Exchange, and Integration Contract, FPC Electric Rate Schedule No. 45. (R. 56-133) Under this contract, PGandE obligated itself to purchase any of the capacity and energy from Rancho Seco Unit No. 1 which is temporarily surplus to SMUD's needs (R. 81-84), thus assuring a market for the plant at full capacity. This guaranteed source of revenue to SMUD from a utility of proven financial reliability (PGandE) had the added advantage to SMUD of increasing the marketability of debt securities issued to finance the plant. (R. 208) Under the contract, PGandE also agreed to provide reserve capacity when the plant is shut down. (R. 75-76) FPC Rate Schedule No. 45 also established capacity and energy "bank accounts." Under this portion of the agreement, PGandE agreed to sell power to SMUD when it is needed in the future in an amount equal to the surplus power purchased from SMUD. This enabled SMUD to defer the construction of a second large thermal plant, to draw on its capacity and energy accounts (i.e., obtain power from PGandE) to meet its power needs prior to the construction of the second unit, and then to replenish its accounts later by delivering capacity and energy back to PGandE when the second unit is built. (R. 79-80)

FPC Electric Rate Schedule No. 45 stated the understanding of the parties that the second unit contemplated by SMUD would have an expected capacity of approximately 830 megawatts (R. 60), but the contract did not limit

the second plant to that size. (R. 173)[2] This contract runs until January 1, 1993, but may be terminated by either party upon 6 years' notice. (R. 113)

C. The Proceedings Below.

After the contracts were filed with the FPC, NCPA filed a complaint with the Commission primarily alleging that PGandE was engaged in a scheme to monopolize the generation of electric power in northern and central California and that the filed contracts were a part of this scheme. (R. 127-39) NCPA sought a hearing, citing Federal Power Act Section 205(e), 16 U.S.C. § 824(e). (See R. 231)[3] By way of relief, NCPA requested the FPC to find:

> "(a) that the June 4, 1970, contracts are unjust and unreasonable, and therefore unlawful, against the public interest, and in violation of the antitrust laws, and void, insofar as they purport to empower PGandE to exclude NCPA from any participation in SMUD's electric power operation;
>
> (b) that such contracts may be approved if they are amended to provide (i) for the increase in capacity of Thermal Unit No. 2 to approximately 1,150,000

2. SMUD has determined since the FPC's decision below that SMUD's second thermal unit will be nuclear, that it will have a capacity of approximately 1100 megawatts, and that it will be constructed as a joint venture rather than by SMUD alone. NCPA has been invited to participate in the project. The Nuclear Regulatory Commission will conduct a prelicensing antitrust review of the project pursuant to Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135(c) before issuing a construction permit.

3. In spite of the frequent reference to Section 206 of the Federal Power Act, 16 U.S.C. § 824(e), in the certiorari petition, no reference to that section of the Act was made by NCPA in any paper filed with the FPC below. Although in this case the same result should obtain under either section, a purported failure of the FPC to comply with the provisions of Section 206 cannot be an issue on appeal since no such objection to the order below was made in NCPA's petition for rehearing in the Commission. (R. 230-238) See Federal Power Act § 313(b), 16 U.S.C. 825*l*(b).

kilowatts, or such larger size as the parties may agree to, with that portion of the capacity in excess of 830,000 kilowatts made available to NCPA through NCPA financing or contractual commitment for the life of the unit; (ii) for an agreement between NCPA and PG & E for the use of such increased capacity for reserves, maintenance and overhaul, delivery to NCPA members, and dispositions of surplus; and (iii) for consideration of the possibility of NCPA utilizing a part of SMUD's surpluses between the time Rancho Seco No. 1 goes into commercial operation and prior to commercial operation of Thermal Unit No. 2;

and to grant such other and further relief as may appear appropriate." (R. 139-41.)

In short, NCPA wanted SMUD to make available to it a share in Rancho Seco No. 2, when built, and an opportunity to purchase surplus power from Rancho Seco No. 1.

The FPC considered NCPA's complaint and issued an order on June 8, 1971, accepting the contracts as rate schedules. The Commission dismissed NCPA's complaint on the basis of the papers filed, explaining that it had no jurisdiction to order the expansion of generating facilities, had no jurisdiction over SMUD (a public agency) and thus could not grant NCPA relief. Appendix B to the Petition at 9-11. The FPC noted that the Atomic Energy Commission appeared to have jurisdiction over the matter. Appendix B to the Petition at 9-10.

On August 3, 1971, the FPC granted NCPA's request for rehearing, Appendix C to the Petition, and on May 5, 1973, issued another order stating that it had considered NCPA's complaint, but that "legal jurisdictional reasons preclude the Commission from granting the substantive relief which NCPA seeks." Appendix D to the Petition at 19. Accordingly, a hearing on NCPA's complaint would

have been futile and the FPC affirmed its earlier order. The FPC's reasoning was explained in some detail. See Appendix D to the Petition.

The decision of the FPC was appealed to the D. C. Circuit Court of Appeals pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The matter was placed on the summary calendar for argument before the Court of Appeals and the decision of the FPC was affirmed in a unanimous opinion, *Northern California Power Agency v. FPC*, 514 F.2d 184 (D.C. Cir. 1975), Appendix F to Petition. The Court of Appeals identified the "crucial issue" before it as whether the denial of hearing on NCPA's allegations was an abuse of discretion by the FPC. 514 F.2d at 187, Appendix F to the Petition at 31-32. The Court of Appeals concluded that a hearing was not mandatory, that the FPC had adequately explained its disposition of the matter, and had not abused its discretion under the circumstances. 514 F.2d at 188-89, Appendix F to the Petition at 32-35.

III. ARGUMENT

A. The Decision of the D.C. Circuit Court of Appeals Is in No Way in Conflict with Applicable Decisions of This Court.

The principal argument advanced by NCPA in support of its petition for certiorari is that the decision of the Court of Appeals is inconsistent with the principles enunciated by this Court in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). Nothing could be further from the fact. The court below cited and carefully followed the decision in *Gulf States*.

1. THE COURT OF APPEALS AND THE FPC RECOGNIZED THE RESPONSIBILITY OF THE FPC TO CONSIDER THE ANTICOMPETITIVE CONSEQUENCES OF MATTERS PROPERLY BEFORE IT.

The Court of Appeals followed *Gulf States* and applied the general rule that in making determinations under broad statutory standards, such as "the public interest" or "just and reasonable", regulatory agencies should consider anticompetitive effects as well as other factors that may be relevant to such a determination. As stated by the court below:

> "The Supreme Court and this court have held, time and again, that the Federal Power Commission, as other regulatory agencies, must consider the anticompetitive consequences of matters properly before it. *See, e.g., Gulf States Utilities Co. v. FPC,* 411 U.S. 747 . . . . That the doctrine is by now fully engrained in our jurisprudence is beyond question." 514 F. 2d at 187, Appendix F to the Petition at 31.

The court below also noted that the FPC had recognized its responsibility to consider the competitive consequences of matters before it for approval. 514 F.2d at 187, Appendix F to the Petition at 31. In the words of the Commission in its order on rehearing:

> "The Commission has regulatory jurisdiction over PG&E. . . . In the exercise of that regulatory jurisdiction the Commission necessarily considers anti-competitive factors which fall therein. . . .
>
> "The Commission's order of June 8, 1971 [dismissing the complaint] does not fail to consider NCPA's complaint. It does so expressly. . . ." Appendix D to the Petition at 18-19.

The record is clear that both the Court of Appeals and the FPC properly recognized the Commission's responsibility to consider the anticompetitive consequences of matters before it as required by *Gulf States.*

2. THE COURT OF APPEALS PROPERLY INTERPRETED GULF STATES AS PRESERVING THE FPC'S DISCRETION TO DISPOSE OF ALLEGATIONS OF ANTICOMPETITIVE EFFECTS WITHOUT A HEARING IN APPROPRIATE CIRCUMSTANCES.

Both the Court of Appeals and the FPC concluded that a hearing on NCPA's antitrust charges was unnecessary under the circumstances of this case. Such a decision is in no way inconsistent with the decision in *Gulf States.* Indeed, in its *Gulf States* opinion, this Court went to some lengths to make clear that the FPC retained discretion to dispose of antitrust allegations without a hearing. In the words of the Court:

> "Our conclusion that, as a general rule, the Commission must consider anticompetitive consequences of a security issue under § 204 *does not mean that the Commission must hold a hearing on objections in every case.* Neither does it mean that every allegation must be fully investigated regardless of its facial merit, or that consideration of the allegations may not, in appropriate circumstances be deferred. . . . So strict a rule would unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case. . . ." 411 U.S. at 762 (emphasis supplied).

On this point, too, the decision below is consistent with *Gulf States.*

3. THE FPC HAS ADEQUATELY EXPLAINED THE REASONS FOR SUMMARY ACTION IN THIS CASE.

Although this Court was careful in its *Gulf States* opinion to preserve the authority of the FPC to rule on antitrust charges without a hearing, it did indicate that it would be necessary for the Commission to explain any summary disposition of such objections. See 411 U.S. at 763-64. In the instant case, the FPC granted a rehearing of its initial dis-

missal order and, after due consideration, issued a second order explaining its reasoning in detail and affirming its earlier dismissal of NCPA's charges. See Appendix D, particularly at 18-22. *Gulf States* requires no more.

Thus, the decisions below demonstrate adherence to the principles enunciated by this Court in *Gulf States*.

B. The Opinion of the D.C. Circuit Court of Appeals Does Not Decide an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question which PGandE believes would be presented if this Court were to grant certiorari is stated at the beginning of this brief. That issue presents no broadly applicable principle of federal law, but rather turns on the peculiar facts of this particular case. Accordingly, no adequate reason appears for granting certiorari.

THE DECISION OF THE FPC BELOW TO DISMISS NCPA'S COMPLAINT WITHOUT A HEARING TURNED ON THE FACTS OF THE PARTICULAR CASE AND THUS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973), discussed in detail above, is a recent, carefully articulated statement by this Court of the only important legal principles of general interest pertinent to this case. *Gulf States* settled the question of the FPC's responsibility to consider pertinent competitive factors in its administration of the Federal Power Act. *Gulf States* settled the question of whether the FPC retained discretion to rule on objections alleging anticompetitive effects without a hearing. And *Gulf States* settled the question of the FPC's duty to explain any summary action it might take. This case now presents the question of whether the discretion, which according to *Gulf States* the FPC has, to act without a hearing was properly exercised under the facts of this case. That was the "crucial issue" identified by the court below. 514 F.2d at 187. PGandE submits that decisions on such questions, which

turn on the facts of each particular case presented to the regulatory agency, are of such limited precedential value that this Court ought not trouble with them in the normal course. The application on a day-to-day basis of the principles enunciated in *Gulf States* is best left to the regulatory agencies, supervised by the Courts of Appeals.

NCPA seeks to elevate the importance of the decision below by arguing that it is "part of a line of cases by which the Federal Power Commission has sought to disable itself from administering the Act in a manner consistent with the antitrust laws." Petition at 10. The Court of Appeals discerned no such line, nor do we. While there have been cases (Petitioner mentions four, in addition to the present case, covering a span of seven years) in which the FPC has dismissed allegations of anticompetitive conduct for one reason or another, there have been other cases in which it has ordered an investigation of and hearing on such charges. E.g., *Pacific Gas and Electric Co.*, FPC Docket No. E-7777;[4] *Pacific Power & Light Co.*, FPC Docket No. E-7796. Moreover, even if there were a pattern of questionable decisions in the FPC, it would be a matter of immediate concern to this Court only if the pattern were duplicated in the Courts of Appeals. Of the cases mentioned by the petitioner, two, *Gulf States Utilities*, 44 F.P.C. 1524 (1970), and *Arkansas Power*

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4. Indeed, on March 14, 1974 in *Pacific Gas and Electric Company*, Docket No. E-7777 in the Federal Power Commission, the FPC, in light of the antitrust charges made by NCPA and certain of its member cities in that proceeding, ordered the institution of an investigation and a hearing under Section 206 of the Federal Power Act, 16 U.S.C. § 824e, into the justness and reasonableness of four contracts to which PGandE is a party. Included among the four contracts to be reviewed by the FPC in that proceeding is the Power Sale, Exchange and Integration Contract, FPC Rate Schedule No. 45, the very contract challenged by NCPA below. It therefore appears that NCPA will get the hearing it wishes and, if it proves its case, will secure whatever relief the FPC has authority to give.

& Light Co., 50 F.P.C. 1289 (1973), were reversed by the Court of Appeals *sub nom.*, respectively, *City of Lafayette v. SEC*, 454 F.2d 941 (D.C. Cir. 1971) and *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975). On the other hand the instant case was, of course, affirmed. Another decision identified by NCPA as a part of this questionable "pattern," *Gainesville Utilities Dept. v. Florida Power Corp.*, 40 F.P.C. 1227 (1968), 41 F.P.C. 4 (1969) was reviewed and affirmed by this Court. *Gainesville Utilities Dept. v. Florida Power Corp.*, 402 U.S. 515 (1971), *reversing Florida Power Corp. v. F.P.C.*, 425 F.2d 1196 (5th Cir. 1970). Finally, the FPC's decision in *City of Paris v. Kentucky Utilities Co.*, 41 F.P.C. 44 (1969), was effectively approved by this Court in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-76 (1973). Even without discussing the propriety of each decision, it is apparent that no pattern exists that should give rise to concern on the part of this Court. Accordingly, NCPA's line of cases argument does not support its petition for certiorari.

C. The Decision Below Was Correct; Affirmance Would Be Superfluous.

Not only is the decision below consistent with this Court's opinion in the *Gulf States Utilities* case, not only does it decide no important question of federal law not yet decided by this Court, but in addition the decision is clearly correct. Accordingly, there is no injustice which should be redressed by this Court through a writ of certiorari.

1. THE COURT OF APPEALS AND THE FPC CORRECTLY INTERPRETED THE JURISDICTIONAL LIMITATIONS ON THE COMMISSION.

The limits on the jurisdiction of the FPC were largely conceded. As stated by the Court of Appeals:

> "All parties agree that the Commission is precluded from asserting jurisdiction over SMUD. *See* 16 U.S.C. §§ 824(b), (f)." 514 F.2d at 185, Appendix F at 27.

As the court below noted, the only matters subject to FPC jurisdiction were those provisions of the contract by which PGandE sold power to SMUD and *those* provisions were not charged to be unjust or unreasonable.[5] 514 F.2d at 187-88, Appendix F to the Petition at 34, 35. NCPA *did* claim that in other provisions in the contract by which SMUD sold power to PGandE, SMUD discriminated in favor of PGandE. However, SMUD sales to PGandE are not subject to FPC jurisdiction. *See* Federal Power Act § 201(b, f) 16 U.S.C. § 824(b, f).

Georgia Power Co. v. FPC, 373 F.2d 485 (5th Cir. 1967), the only case on the jurisdictional issue cited by NCPA in its Petition, was a decision approving changes ordered by the FPC in the provisions of a wholesale sale contract under which a utility subject to FPC jurisdiction sold power to a municipality. The case only considered FPC authority over sales subject to FPC jurisdiction and did not consider the FPC's authority over power sales by an entity not subject to FPC jurisdiction. It therefore provides no authority contrary to the decision in this case.

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5. In its petition for certiorari, NCPA hints for the first time that PGandE's rates were set unreasonably low in exchange for the right to purchase all of SMUD's excess power. Petition at 10. However, since that unfounded assertion was never made below, it cannot now be raised on appeal. See Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

It also appears to be conceded that the FPC has no authority to order the expansion of any thermal power generating facility, let alone that of an agency not subject to FPC jurisdiction. The FPC's licensing jurisdiction is confined to hydroelectric facilities under Part I of the Federal Power Act, 16 U.S.C. §§ 792-823. This Court specifically ruled in March of this year that the FPC had no authority to license and regulate thermal electric plants. *Chemehuevi Tribe of Indians v. FPC*, ... U.S. ...., 43 L.Ed.2d 279 (1975). Whatever doubt may have existed about the FPC's authority in this regard has now been settled. There is no need for this Court to consider the matter again.

NCPA persists in the suggestion that the FPC could do indirectly that which it has no authority to do directly—withhold its approval of PGandE's just and reasonable rates in order to force SMUD to give NCPA the concessions it sought. Both common sense and precedent suggest that such action by the FPC would be unlawful. The court below agreed, citing *Central West Utilities Co. v. FPC*, 297 F.2d 306 (3d Cir. 1957). 514 F.2d at 189, Appendix F to the Petition at 35. By manipulating wholesale sales by large power companies, the FPC could influence or control many aspects of utility operations and many entities which Congress has explicitly withheld from its jurisdiction. Due regard for the Congressional regulatory scheme could not permit such an expansion of FPC authority.

2. THE COURT OF APPEALS PROPERLY APPROVED THE FPC'S DISCRETIONARY DECISION TO DISPOSE OF NCPA'S CHARGES WITHOUT A HEARING.

In view of the FPC's clear inability to grant NCPA the relief it sought, holding a hearing on NCPA's monopoly charge would have been a waste of time. Once the implications of the FPC's limited jurisdiction are understood, the

Commission's decision not to hold a hearing appears unexceptionable.

In affirming the FPC's decision, the Court of Appeals properly considered the lack of a "reasonable nexus" between the contract provisions subject to FPC jurisdiction and the anticompetitive scheme alleged. The lower court's attention to this point exemplifies its meticulous adherence to this Court's decision in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).

The requirement that there be a reasonable nexus or connection between activities sought to be challenged in an administrative proceeding and the particular matter to be passed on by the agency in that proceeding was first announced in *City of Lafayette v. SEC*, 454 F.2d 941, 953 (D.C. Cir. 1971). *Gulf States*, of course, affirmed the D.C. Circuit's decision in that case, thereby indicating this Court's approval of the requirement. In *Gulf States* this Court ruled that the FPC must consider the anticompetitive consequences, if any, of the *matter before it for review*, not the legality under the antitrust laws of unrelated conduct of the applicant before the agency. This limitation in the Court's ruling appears both in its statement of the question before it, 411 U.S. at 749, its conclusion on the question, 411 U.S. at 758-59, and its description of that conclusion, 411 U.S. at 762, as well as from the analysis throughout the opinion. Thus, the Court of Appeals in this case was applying a well established concept when it considered NCPA's failure to show a reasonable nexus between PGandE's allegedly anticompetitive scheme and the matter before the Commission and approved the FPC's dismissal of NCPA's complaint.

IV. CONCLUSION

The decision of the United States Court of Appeals is consistent with the decisions of this Court, decides no important federal question which should be addressed by this Court, and is clearly correct. For these reasons the petition for a writ of certiorari should be denied.

August 22, 1975

Respectfully submitted,

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